



STATE OF NEW JERSEY

In the Matter of James Donovan, *et al.*, Police Captain, various jurisdictions

**FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION**

CSC Docket Nos. 2019-1346, *et al.*

Examination Appeal

ISSUED: February 25, 2019 (JH)

James Donovan and Terence Joynt (PM1774W), Bayonne; Daniel McGuire (PM1792W), Ewing; and Walter Laurencio (PM1914W), Union City; appeal the examination for Police Captain (various jurisdictions). These appeals have been consolidated due to common issues presented by the appellants.

The subject exam consists of two parts: a multiple-choice portion and an oral portion. The multiple-choice (written) portion was administered on October 11, 2018 and consisted of 70 multiple choice questions.

Donovan presents that he was only provided with 30 minutes for review and he was not permitted to review his “own test booklet and [his] own scored answer sheet.” In addition, he contends that his ability to take notes on exam items was severely curtailed. As such, he requests that any appealed item in which he selected the correct response be disregarded and that if he misidentified an item number in his appeal, his argument be addressed.

Regarding review, it is noted that the time allotted for candidates to review is a percentage of the time allotted to take the examination. The review procedure is not designed to allow candidates to retake the examination, but rather to allow candidates to recognize flawed questions. First, it is presumed that most of the questions are not flawed and would not require more than a cursory reading. Second, the review procedure is not designed to facilitate perfection of a candidate’s test score, but rather to facilitate perfection of the scoring key. To that end, knowledge of what choice a particular appellant made is not required to properly

evaluate the correctness of the official scoring key. Appeals of questions for which the appellant selected the correct answer are not improvident if the question or keyed answer is flawed.

With respect to misidentified items, to the extent that it is possible to identify the items in question, they are reviewed. It is noted that it is the responsibility of the appellant to accurately describe appealed items.

An independent review of the issues presented under appeal has resulted in the following findings:

Question 17 indicates that you are reviewing with your subordinates Attorney General Directive No. 2018-3, which mandates that all law enforcement agencies adopt and implement an Early Warning System (EW System). While the chief executive of each agency may determine any supplemental performance indicators, the directive lists certain performance indicators that are required to be included in all EW Systems. Candidates are presented with four statements and were required to determine which were performance indicators that are specifically required by the directive to be included in a department's EW System. The keyed response, option b, did not include statement IV, "Any discharges of a department-issued firearm by the officer." Laurencio argues that "prior to Directive 2018-3, the only other mention . . . to an Early Warning System was found in the *Attorney General Guidelines on Internal Affairs Policy and Procedures* . . . [which] addresses the purpose of an EW System and lists 14 performance indicators . . . The fifth listed performance indicator . . . is 'Incidents of force usage, including firearms discharges and use of less lethal non-deadly force.'" Laurencio maintains that "although Directive 2018-3 delineates mandatory performance indicators, a department that includes 'any discharges of a department issued firearm' . . . would be in conformance with the Internal Affairs Policy in regard[d] to an EW System." Laurencio further notes that the last indicator listed in the Directive No. 2018-3 is "any other indicators, as determined by the agency's chief executive" and argues that "a chief executive who is . . . in conformance with 'strict adherence to the Attorney General's policy requirement' on Internal Affairs Policy by including 'Incidents of force usage, including firearms discharges and use of less lethal non-deadly force,' in the EW System, would then be in compliance with BOTH the Internal Affairs Policy AND Directive 2018-3 . . ." It is noted that the question specifically refers to Attorney General Directive No. 2018-3 which provides:

C. Selection of Performance Indicators

An EW System may monitor many different categories of officer conduct which indicate potentially escalating risk of harm to the public, the agency, and/or the officer. The following performance indicators shall be included in all EW Systems, but also can be supplemented based upon

the unique characteristics of the department and the community it serves. The chief executive of the department shall determine any such supplemental performance indicators. To the extent possible, supplemental performance indicators should be objectively measurable and reasonably related to potentially escalating harmful behavior by the officer.

1. Internal affairs complaints against the officer, whether initiated by another officer or by a member of the public;
2. Civil actions filed against the officer;
3. Criminal investigations of or criminal complaints against the officer;
4. Any use of force by the officer that is formally determined or adjudicated (for example, by internal affairs or a grand jury) to have been excessive, unjustified, or unreasonable;
5. Domestic violence investigations in which the officer is an alleged subject;
6. An arrest of the officer, including on a driving under the influence charge;
7. Sexual harassment claims against the officer;
8. Vehicular collisions involving the officer that are formally determined to have been the fault of the officer;
9. A positive drug test by the officer;
10. Cases or arrests by the officer that are rejected or dismissed by a court;
11. Cases in which evidence obtained by an officer is suppressed by a court;
12. Insubordination by the officer;
13. Neglect of duty by the officer;
14. Unexcused absences by the officer; and
15. Any other indicators, as determined by the agency's chief executive.

Moreover, the question clearly accounts for number 15, as indicated above, *i.e.*, “while the chief executive of each agency may determine any supplemental performance indicators,” and directs candidates to focus on the specific indicators noted in numbers 1 through 14, *i.e.*, “the directive lists certain performance indicators that are required to be included in all EW Systems.” Thus, the question is correct as keyed.

Question 28 indicates that Officer Sherman responded to a call at the Lee residence. While speaking with the homeowner, Bobby Lee, Officer Sherman observed several items in plain view on the kitchen table. Candidates were presented with four statements and were required to determine, based on *N.J.S.A.*

2C:39-3,¹ which were weapons and devices that is Lee prohibited from possessing in his home. The keyed response, option b, did not include, III, “box of 9mm hollow point bullets.” Donovan refers to *State v. Jama Smith*, 197 N.J. 325 (2009) in which the court noted:

Thus, we presume that the Legislature, for nearly twenty-five years now, has agreed with the view addressed in [*State v. Lee*, 96 N.J. 156 (1984),] that N.J.S.A. 2C:39-3(b) intended to make the *possession* of certain illicit weapons, such as a sawed-off shotgun, a per se offense . . . Indeed, many courts already have extrapolated *Lee*’s reference to subsection (b), being a per se offense, as applicable to the other like-worded subsections of 2C:39-3. See, e.g., *State v. Blaine*, 221 N.J. Super. 66, 68 (App. Div. 1987) (‘As the Supreme Court made clear [in *Lee*] . . . N.J.S.A. 2C:39-3 defines various categories of prohibited weapons and devices whose bare possession constitutes a crime of the third or fourth degree. Five of these categories, namely destructive devices, sawed-off shotguns, silencers, defaced firearms, and dum-dum

¹ N.J.S.A. 2C:39-3 (Prohibited Weapons and Devices) provides, in part:

- a. Destructive devices. Any person who knowingly has in his possession any destructive device is guilty of a crime of the third degree.
- b. Sawed-off shotguns. Any person who knowingly has in his possession any sawed-off shotgun is guilty of a crime of the third degree.
- c. Silencers. Any person who knowingly has in his possession any firearm silencer is guilty of a crime of the fourth degree.
- d. Defaced firearms. Any person who knowingly has in his possession any firearm which has been defaced, except an antique firearm or an antique handgun, is guilty of a crime of the fourth degree.
- e. Certain weapons. Any person who knowingly has in his possession any gravity knife, switchblade knife, dagger, dirk, stiletto, billy, blackjack, metal knuckle, sandclub, slingshot, cestus or similar leather band studded with metal filings or razor blades imbedded in wood, ballistic knife, without any explainable lawful purpose, is guilty of a crime of the fourth degree.
- f. Dum-dum or body armor penetrating bullets. (1) Any person, other than a law enforcement officer or persons engaged in activities pursuant to subsection f. of N.J.S.2C:39-6, who knowingly has in his possession any hollow nose or dum-dum bullet, or (2) any person, other than a collector of firearms or ammunition as curios or relics as defined in Title 18, United States Code, section 921 (a) (13) and has in his possession a valid Collector of Curios and Relics License issued by the Bureau of Alcohol, Tobacco and Firearms, who knowingly has in his possession any body armor breaching or penetrating ammunition, which means: (a) ammunition primarily designed for use in a handgun, and (b) which is comprised of a bullet whose core or jacket, if the jacket is thicker than .025 of an inch, is made of tungsten carbide, or hard bronze, or other material which is harder than a rating of 72 or greater on the Rockwell B. Hardness Scale, and (c) is therefore capable of breaching or penetrating body armor, is guilty of a crime of the fourth degree. For purposes of this section, a collector may possess not more than three examples of each distinctive variation of the ammunition described above. A distinctive variation includes a different head stamp, composition, design, or color.

bullets . . . define weapons and devices the possession of which is per se criminal’) . . . *Id.* at 335-336.

It is noted that *N.J.S.A. 2C:39-3g(2)a* provides, in pertinent part, that “nothing in subsection f. (1) shall be construed to prevent a person from keeping such ammunition at his dwelling, premises or other land owned or possessed by him, or from carrying such ammunition from the place of purchase to said dwelling or land . . .” As such, the State Legislature designated a specific exception for dum-dum or armor piercing ammunition under these circumstances. As such, the question is correct as keyed.

Question 48 refers to Michael Carpenter and Roger Fulton, *Law Enforcement Management: What Works and What Doesn’t* (2010), and indicates that your department requires every lieutenant to submit a status report to their supervisor at the end of every week. Lieutenant Kilarney was three days late in submitting his report to you. You know you need to address this, so you call him into your office to give him some constructive criticism. The question asks, based on the text by Carpenter and Fulton, for the statement that would be most appropriate for you to say to Lieutenant Kilarney to give him constructive criticism regarding this matter. The keyed response is option b, “You missed the deadline for turning in the status report last week.” Donovan and Joynt assert that option c, “I know you’ve had a lot of other work to do lately, but you still need to try to submit the status report on time,” is the best response. Specifically, Donovan maintains that the keyed response is not consistent with the text. In this regard, he refers to the text, under the heading, “Section 4 – ‘You’ve Made a Mistake’ – How to Criticize Effectively.”² Joynt argues that the keyed response is “clearly not constructive criticism. It is simply a statement of fact. There is a big difference . . . The question stem suggests saying something (positive) as the stem of the question utilizing the word (constructive) suggests.” In this regard, option c is not specific, as indicated above,³ and neither answer choice offers solutions to address the problem.

² This section provides, in part:

Be Specific

Be sure that you address conduct at the date, time, and place it occurred. A phrase such as, ‘You are always late with your reports,’ is not acceptable. A phrase such as, ‘You missed the April 20th deadline for your report,’ is more acceptable . . .

Say Something Positive

‘I know you had a difficult situation that night that you would normally handle well . . .’ or ‘You are a good sergeant who I can normally depend on . . .’ Positive openings such as these can be very helpful in reinforcing the overall worth of the individual to the department, while still allowing you to get to the specific problem area . . .

³ Despite Donovan’s contention, option b does refer to the report that was due “last week.”

As such, the Division of Test Development and Analytics has determined to double key this item to option b and option c.

Question 62 indicates that as a captain in the Smalltown Police Department, your chief has asked you to gather information and prepare/review specific sections of the Smalltown Police Department 2017 Annual Report. Candidates were directed to refer to the stimulus materials provided in the test booklet. The question asks, based solely on the information for 2016 and 2017 contained in Figure 1,⁴ “during what 3-month period does it appear that anti-drinking and driving efforts should be focused in the future, in order to decrease DWI arrests?” The keyed response is option d, “August through October.” McGuire, who selected option b, “March through May,” argues that “the question requires at least three assumptions: 1. That the DUI arrests indicated in the graph for 2016 and 2017 were the results of routine patrol and not ‘focused enforcement[;]’ 2. That focused enforcement would mean saturation patrols or DUI checkpoints . . .[;] 3. That saturation patrols or DUI checkpoints are proven to deter motorists from driving while impaired. The question . . . appears to assume that the only method of focused DUI enforcement is a DUI checkpoint. While DUI checkpoints (with required advanced public notice) may deter motorists from driving while impaired, saturation patrols will probably net more arrests” [footnotes omitted]. It is noted that the directions for the questions that are based on the stimulus materials (questions 62 through 70) inform candidates, “No prior knowledge or experience is needed to answer these questions. Use only the information provided in the stimulus material.” Furthermore, as noted above, the question specifically instructs candidates, “based solely on the information for 2016 and 2017 contained in Figure 1 . . .” As such, candidates were not required to assume the level or type of enforcement. Thus, the question is correct as keyed.

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Figure 1. Driving While Intoxicated (DWI) Arrests Made by Smalltown Police

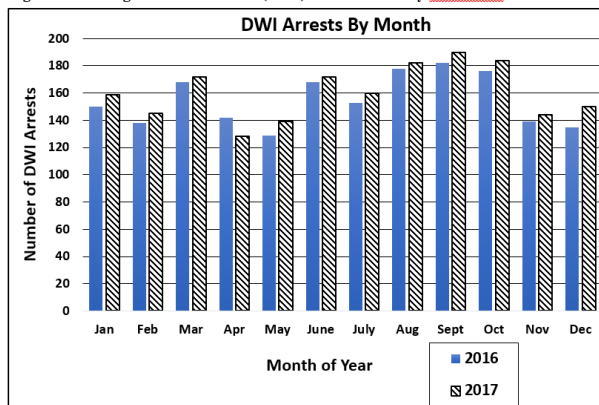


Figure 1: Shows the total number of DWI arrests made by Smalltown Police each month in 2016 and 2017.

CONCLUSION

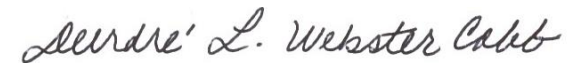
A thorough review of appellants' submissions and the test materials reveals that the appellants' examination scores, with the exception of the above noted scoring change, are amply supported by the record, and the appellants have failed to meet their burden of proof in this matter.

ORDER

Therefore, it is ordered that these appeals be denied.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 20TH DAY OF FEBRUARY, 2019



Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

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